Supreme Court, U.S.
FILED
JUN 16 2005
OFFICE OF THE CLERK

NO. 04-1067

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF GEORGIA,

Petitioner,

vs.

SCOTT FITZ RANDOLPH,

Respondent.

On Petition For A Writ of Certiorari To
The Georgia Supreme Court

BRIEF OF COLORADO, ALABAMA, DELAWARE, HAWAII, ILLINOIS, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN W. SUTHERS
Attorney General
JOHN J. KRAUSE
Interim Solicitor General
REBECCA A. ADAMS*
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5785

**Counsel of Record*

TROY KING
Alabama Attorney General
State of Alabama
11 S. Union Street
Montgomery, AL 36130

M. JANE BRADY
Attorney General of Delaware
Delaware Department of Justice
820 N. French St.
Wilmington, DE 19801

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
Illinois Attorney General
100 W. Randolph Street,
12th Floor
Chicago, IL 60601

PHILL KLINE
Attorney General
State of Kansas
120 S.W. 10th Avenue
Topeka, KS 66612-1597

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MICHAEL A. COX
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 W. High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

BRIAN SANDOVAL
Attorney General
Office of the Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701
775-684-1112

WAYNE STENEHJEM
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

LAWRENCE E. LONG
Attorney General
State of South Dakota
500 E. Capitol Avenue
Pierre, SD 57501-5070

JIM PETRO
Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

W. A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK 73105-4894

WILLIAM SORRELL
Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609

HARDY MYERS
State of Oregon
Attorney General
1162 Court St. N.E.
Salem, OR 97301

ROB MCKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

PATRICK J. CRANK
Wyoming Attorney General
Attorney General's Office
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Whether a third party may give law enforcement valid consent to search premises shared with another when the other occupant is present and expressly objects to the search.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. Consent To Conduct A Warrantless Search Of A Residence Given By A Third Party With Common Authority Is Valid Even In The Face Of A Co-Occupant Who Is Physically Present At The Scene And Refuses To Consent To A Search 3

CONCLUSION 12

TABLE OF AUTHORITIES

PAGE

CASES

Bumper v. North Carolina, 391 U.S. 543 (1968).....9

Chapman v. United States, 365 U.S. 610 (1961).....11

Coolidge v. New Hampshire, 403 U.S. 443 (1971).....9, 10

Frazier v. Cupp, 394 U.S. 731 (1969).....7, 9, 12

Georgia v. Randolph, 604 S.E.2d 835 (Ga. 2004).....1, 2, 6, 8

Hoffa v. United States, 385 U.S. 293 (1966).....6

Illinois v. Rodriguez, 497 U.S. 177 (1990).....4, 10

J.L. Foti Constr. Co. v. Donovan, 786 F.2d 714 (6th Cir. 1986).....6

People v. Cosme, 397 N.E.2d 1319 (N.Y. 1979).....10

Randolph v. State, 590 S.E.2d 834 (Ga. App. 2003).....2

Schneckloth v. Bustamante, 412 U.S. 218 (1973).....9

Silva v. State, 344 So.2d 559 (Fla. 1977).....6

State v. Leach, 782 P.2d 1035 (Wash. 1989).....6

Stoner v. California, 376 U.S. 483 (1964).....10

United States v. Block, 590 F.2d 535 (4th Cir. 1978).....11

United States v. Chaidez, 919 F.2d 1193 (7th Cir. 1990).....6

United States v. Matlock, 415 U.S. 164 (1974)..... passim

United States v. Morning, 64 F.3d 531 (9th Cir. 1995) ...6, 11

United States v. Rith, 164 F.3d 1323 (10th Cir. 1999).....8

TABLE OF AUTHORITIES

PAGE

United States v. Robinson, 479 F.2d 300 (7th Cir. 1973) 12

United States v. Shelton, 337 F.3d 529 (5th Cir. 2003) 6

United States v. Sumlin, 567 F.2d 684 (6th Cir. 1977) 5

CONSTITUTIONS

U.S. Const. amend. IV 3

OTHER AUTHORITIES

4 Wayne R. LaFave, Search and Seizure, § 8.3(c) (4th ed. 2004) 7, 10, 11

Charles H. Whitebread & Christopher Slobogin, Criminal Procedure: An Analysis of Cases and Concepts § 12.04 (3rd ed. 1993) 8

James B. White, The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock, 1974 S.Ct.Rev. 165 7

INTERESTS OF AMICI CURIAE

The Amici States' interest arises from the fact that this case implicates a constitutionally permissible and wholly legitimate aspect of effective police activity: consent searches, specifically a third party's ability to provide consent to search. In *Georgia v. Randolph*, 604 S.E.2d 835 (Ga. 2004), the Georgia Supreme Court determined that a co-occupant cannot give law enforcement valid consent to search where the other occupant is present and objects to the search. This decision misinterprets the previous decisions of this Court and undermines the strong public policy in favor of consent searches.

STATEMENT OF THE CASE AND FACTS

On July 6, 2001, the respondent's wife reported a domestic dispute, and the police responded. The respondent's wife indicated that the respondent had taken their son. She also accused the respondent of using cocaine. When the respondent returned home without their son, he stated that he had taken the child to a neighbor's house because he was afraid his wife was going the leave the country with their son. Sergeant Brett Murray then accompanied the respondent's wife to retrieve the child.

After they returned home, the respondent's wife renewed her allegations regarding the respondent's cocaine use and told officers that there were drugs in the home.

Sergeant Murray confronted the respondent about his wife's allegations and asked for consent to search the home. The respondent said "no." Sergeant Murray then asked the respondent's wife for her consent to search, and she not only agreed but led Sergeant Murray to an upstairs bedroom where he observed a piece of cut straw covered with white

residue. Sergeant Murray left to obtain an evidence bag from his car, and when he returned, the respondent's wife informed him that she was withdrawing her consent to search the house. Sergeant Murray obtained a search warrant, and during the ensuing search, seized numerous drug-related items.

The respondent was charged with possession of cocaine, and he subsequently moved to suppress the drugs, claiming that the search of his home over his express objection violated his Fourth Amendment rights. The trial court denied the motion. The Georgia Court of Appeals granted the respondent's application for an interlocutory appeal and reversed the trial court's ruling. *See Randolph v. State*, 590 S.E.2d 834 (Ga. App. 2003). The Georgia Supreme Court then granted the State's petition for a writ of certiorari to decide whether a third party may give valid consent to search common areas of a home shared by another occupant who is present and objects to the search. The Georgia Supreme Court affirmed the judgment of the court of appeals:

> Inasmuch as we are faced with a situation in which two persons have equal use and control of the premises to be searched, we conclude the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.

Randolph, 604 S.E.2d at 836.

SUMMARY OF THE ARGUMENT

The Georgia Supreme Court held that consent to search given by a third party with common authority is not valid to permit a warrantless search in the face of the express refusal of another occupant who is physically present at the scene. *Randolph*, 604 S.E.2d at 836. The holding of the Georgia Supreme Court is based on a misunderstanding of the facts and holding of *United States v. Matlock*, 415 U.S. 164 (1974), and fails to consider both the legitimacy and value of consent searches in the investigative process as well as the need to encourage people to report crime.

ARGUMENT

I. Consent To Conduct A Warrantless Search Of A Residence Given By A Third Party With Common Authority Is Valid Even In The Face Of A Co-Occupant Who Is Physically Present At The Scene And Refuses To Consent To A Search.

The question in this case is whether a third party may give law enforcement valid consent to search premises shared with another even though the other occupant is present and expressly objects to the search. Where a third party has common authority over the premises to be searched, her consent is valid even when her co-occupant is present and objects.

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by law enforcement. U.S. Const. amend. IV. However, "a warrantless entry and search by law

enforcement officers does not violate the Fourth Amendment's proscription of 'unreasonable searches and seizures' if the officers have obtained the consent of a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (citing *Matlock*, 415 U.S. at 171).

In *Matlock*, this Court held that consent is valid when "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 171. This Court explained:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinement, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that **it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.**

415 U.S. at 171 n.7 (citations omitted) (emphasis added). While the facts presented in *Matlock*, as discussed below, differ slightly from those in the present case, the reasoning of *Matlock* is equally relevant and should be applied to the facts presented here.

Police officers arrested Matlock in his front yard, and although the officers knew that Matlock lived in the house, they did not ask him which bedroom was his or whether he would consent to a search of the home. Instead, the police requested consent to search the home from Matlock's housemate, and she agreed. While searching the bedroom Matlock shared with his housemate, the officers discovered and seized a large amount of cash. This Court upheld the search, reasoning that the police obtained voluntary consent from a person with common authority:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 171.

The Georgia Supreme Court erred in construing *Matlock* as invalidating third-party consent where a co-occupant is present and objects to the search. *Matlock* did not turn on the defendant's presence or absence, or his consent or nonconsent, but rather his assumption of the risk and the third party's right to consent.

The rationale of *Matlock* is that a co-occupant assumes the risk that another occupant may expose common areas to a search. Under such circumstances "[t]here is no reasonable expectation of privacy to be protected." *United States v. Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977). The additional fact that the respondent in this case expressly

refused to consent in no way lessened the risk that his wife would consent. *See J.L. Foti Constr. Co. v. Donovan*, 786 F.2d 714, 716-17 (6th Cir. 1986) (citing *Sumlin*, 567 F.2d at 688); *see also United States v. Shelton*, 337 F.3d 529, 537 (5th Cir. 2003) ("[T]he Fourth Amendment does not protect 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'") (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)). An occupant who shares common authority with another understands that his "privacy is not absolute, but contingent in large measure on the decisions of another." *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990); *see also United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995) (Occupant's reasonable expectations of privacy "must include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry."). Thus, while *Matlock* did not specifically address the existence of an objecting co-occupant, the assumption of the risk rationale is equally applicable to these facts.

Nevertheless, some courts have interpreted *Matlock* as precluding consent searches where the co-occupant is present and objects to the search, holding that *Matlock* concerned an absent co-occupant. *See Randolph*, 604 S.E.2d at 837; *State v. Leach*, 782 P.2d 1035 (Wash. 1989); *Silva v. State*, 344 So.2d 559 (Fla. 1977). The case at bar presents this Court with the opportunity to reject these interpretations and to clarify that *Matlock's* reasoning applies where a third party with common authority voluntarily consents to a search even though another occupant is present and objects to the search.

A third party's ability to consent in her own right is based on her relationship with the property and the fact that the remaining occupants have assumed the risk "that one of their number might permit the common areas to be

searched." *Matlock*, 415 U.S. at 171 n.7. The rationale behind permitting searches based upon third-party consent was first articulated by this Court in *Frazier v. Cupp*, 394 U.S. 731 (1969), wherein this Court stated that by allowing another person access to a particular place or item, the defendant was assuming the risk that the third party would allow others to search it:

> Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.

Id. at 740. Thus, an occupant's decision to permit another "joint access [to] or control [over the property] for most purposes" limits that occupant's reasonable expectation of privacy and to that extent limits his Fourth Amendment protections. *Matlock*, 415 U.S. at 171 n.7; *see also* James B. White, *The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock*, 1974 S.Ct.Rev. 165, 223-24 (Once a defendant has given a third party the unrestricted right to share in the use and control of certain property, he has, "as a matter of constitutional law, placed this aspect of his privacy irrevocably in the hands of the joint occupant...."), *quoted in* 4 Wayne R. LaFave, *Search and Seizure*, § 8.3(c) at 153 (4th ed. 2004).

The Georgia Supreme Court cited *Matlock* as holding that "the consent of one who possesses common authority

over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Randolph*, 604 S.E.2d at 837 (quoting *Matlock*, 415 U.S. at 170). But both the structure of the *Matlock* opinion and the facts presented in *Matlock* indicate its holding is much broader. Perhaps most instructive is the fact that the defendant in *Matlock* was not absent at all, but was present in the front yard of his home. Moreover, the quoted language cited by the Georgia Supreme Court comes as part of this Court's discussion of how prior caselaw contributed to its reasoning. Concluding the discussion of these cases, this Court stated its holding, which goes beyond the very limited reading adopted by the Georgia Supreme Court:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 170. This unequivocal holding is not qualified by the Court's earlier reference to the "absent, nonconsenting person." *See United States v. Rith*, 164 F.3d 1323, 1328 (10th Cir. 1999); *see also* Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* § 12.04, at 265-66 (3rd ed. 1993) (*Matlock* stands for the proposition that "if the state can establish that the third party shares an area with another more or less equally, that party's consent authorizes a search of the entire area regardless of the other person's proximity to, agreement with, or relationship with the third party.").

In addition to the fact that the legal analysis supports the validity of third-party consent, such consent should be considered valid for policy reasons as well. This Court has long recognized the validity of third-party consent. *See Frazier*, 394 U.S. at 740; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971) (where defendant's wife surrendered to police guns and clothing belonging to her husband, this Court found nothing impermissible in the admission of that evidence since the wife had not been coerced); *Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968) (although consent was not voluntary, the Court at least intimated that if the third party had voluntarily acquiesced to a search of the premises, the resulting search would have been binding upon defendant).

Consent searches were later accepted as "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamante*, 412 U.S. 218, 228 (1973). Consent searches serve a legitimate and valuable purpose and are part of the standard investigative technique of law enforcement agencies: "In situations where police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227. Additionally, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243. Thus, third-party consent furthers both society's interest in controlling crime and individuals' interest in aiding law enforcement.

As a policy matter, occupants should not be prohibited from acting as cooperative citizens. By

recognizing that a third party has the right to permit inspection in her own right, the *Matlock* court intended to leave the third party with the ability to act in her own interests or the interests of the public. *See Coolidge*, 403 U.S. at 488 ("[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."). Indeed, a third party should be allowed to act in her own interest to allow police to seize illegal drugs that she might later be charged with possessing. *See* LaFave, *supra*, § 8.3(d) at 161. A third party may also desire to rid her home of drugs or other illegal items because of the dangers they present. *See People v. Cosme*, 397 N.E.2d 1319 (N.Y. 1979) (defendant's fiancée summoned police to home she shared with defendant because defendant was storing drugs in closet also used by her; court held her consent was effective even though defendant was present and objected to the search).

Despite the strong public policy in favor of third-party consent, a co-occupant's right to privacy is not completely at the mercy of those with whom he lives. In addition to proving that consent was voluntarily given, the prosecution must show that the third party had common authority over the premises to be searched.[1] *See Matlock*, 415 U.S. at 171; *compare Stoner v. California*, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room); *Chapman v. United States*, 365 U.S.

---

[1] If the third party lacks common authority to consent to the search, the evidence will not be excluded if the prosecution can establish that "the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. at 188 (internal quotations and citations omitted).

610 (1961) (landlord could not validly consent to the search of a house he had rented to another).[2] Moreover, where an occupant has taken sufficient, affirmative steps to protect his personal effects, he may have a protected expectation of privacy based on the rationale that he has not assumed the risk. *See United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978) (holding that while a mother could consent to a search of her son's room, she did not have authority to consent to a search of a locked footlocker within the room); *see also Morning*, 64 F.3d at 536 ("A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence.").

However, it is not sufficient for a defendant to merely claim exclusive control without establishing that he has sole access to the place searched. *See* LaFave, *supra*, § 8.3(f) at 168-69. The legitimate and valued practice of making consent searches should not be unduly burdened by complex, individual living arrangements:

> The police might be deterred from employing consent searches altogether if they were required to ascertain the ownership or possession or custody of every article or space on the premises searched. The metaphysical subtleties would be endless and consent searches would be lost from the law enforcement arsenal.

---

[2] While the results reached in *Stoner* and *Chapman* are consistent with the *Matlock* opinion, those cases were analyzed under a now-rejected, property-based understanding of the Fourth Amendment. *See Matlock*, 415 U.S. at 171 n.7.

United States v. Robinson, 479 F.2d 300, 303 (7th Cir. 1973) (citing *Frazier*, 394 U.S. at 740).

Where, as here, the occupant fails to take any steps to protect his privacy interest in his personal effects, third-party consent to search is valid even in the face of a present, objecting co-occupant.

CONCLUSION

For the foregoing reasons, the judgment of the Georgia Supreme Court should be reversed.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General of Colorado
JOHN J. KRAUSE
Interim Solicitor General of Colorado
REBECCA A. ADAMS*
Assistant Attorney General
*Counsel of Record

1525 Sherman Street, 5th Floor
Denver, CO 80203
Telephone: (303) 866-5785
Counsel for Amici States